

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MAURICIO ERNESTO AYALA,

Defendant and Appellant.

B211262

(Los Angeles County
Super. Ct. No. NA074693)

APPEAL from a judgment of the Superior Court of Los Angeles County.

James B. Pierce, Judge. Affirmed in part and reversed in part; remanded with directions.

Marilee Marshall & Associates and Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Daniel C. Chang and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

Mauricio Ernesto Ayala appeals from the judgment entered upon his convictions by jury of willful and malicious discharge of a firearm from a motor vehicle (Pen. Code, § 12034, subd. (c), count 2),¹ assault with a semiautomatic firearm (§ 245, subd. (b), count 3) and possession of a firearm by a felon (§ 12021, subd. (a)(1), count 4).² The jury found the gang allegation within the meaning of section 186.22, subdivision (b) to be true as to count 4, but untrue as to counts 2 and 3. It also found to be true as to count 2 the allegation that appellant personally and intentionally discharged a firearm (§ 12022.53, subds. (c)–(d)) and as to count 3 the allegations that he personally used a firearm (§ 12022.5, subds. (a) & (d)) and personally inflicted great bodily injury (§ 12022.7, subd. (a)). The trial court sentenced appellant to an aggregate state prison term of seven years plus 25 years to life. As to count 2, appellant was sentenced to the upper term of seven years, plus 25 years to life pursuant to section 12022.53, subdivision (d), to run consecutively. As to count 3, appellant was sentenced to the upper term of nine years, plus ten years pursuant to section 12022.5, subdivisions (a)–(d), plus three years pursuant to section 12022.7, subdivision (a). As to count 4, appellant was sentenced to the upper term of three years, plus four years pursuant to section 186.22, subdivision (b)(1)(A). Counts 3 and 4 were stayed pursuant to section 654.

Appellant contends that the evidence is insufficient to support the true finding on the gang enhancement with respect to the felon in possession of a firearm charge. We agree.

FACTUAL BACKGROUND

In the late afternoon of June 16, 2007, Nickolas Tibor and his friend Jose Miguel Monreal were talking at the corner of 9th and Centre Streets, in San Pedro. Tibor saw a white Honda drive by with appellant and two others inside. The driver was bald and had

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² The jury deadlocked on count 1 for attempted murder. The trial court declared a mistrial on that count, which was later dismissed at the People's request in the interest of justice pursuant to section 1385.

a tattoo on the back of his head. Tibor made eye contact with appellant, who was in the rear passenger seat. No words were exchanged between Tibor and the passengers in the car. But Tibor said to Monreal, “There goes a Yellow Chicken,” a derogatory term for members of the Young Crowd gang. Tibor believed appellant was a member of the Young Crowd. Tibor denied being a member of the rival Rancho San Pedro gang and denied ever being involved in a gang.

The Honda drove up Centre Street, made a U-turn and returned. Appellant was then seated behind the driver and his window was open. The car stopped, appellant remained inside, raised a gun, aimed it out the window at Tibor, and fired one shot at him. Tibor began walking and was hit in the right hip with a bullet that exited his left hip. At trial about a year later, he was still experiencing pain and was unable to engage in his former employment of installing rain gutters. After the shot was fired, the Honda sped up. No words were exchanged during the shooting.

Tibor believed that appellant shot him because of their longstanding dispute over a girl. In the past when they met, they “mad-dogged” each other. A few days before the shooting, Tibor saw appellant in a Mustang convertible with another person. As appellant drove by Tibor, he raised a gun and pointed it in Tibor’s direction. Tibor ducked in fear, but appellant did not shoot. No words were exchanged during that incident.

Los Angeles Police Officer Adriana Bravo testified as a gang expert, specifically regarding San Pedro gangs, including the Young Crowd gang. She testified that the Young Crowd gang engaged in burglaries, attempted murders, sales of narcotics, criminal threats, vandalism, robberies and assaults. Its purpose in committing these crimes was to intimidate and instill fear within the community. The gang’s strength increased as it created more fear. Officer Bravo testified about two convictions suffered by Young Crowd gang members: one for assault with a deadly weapon and one for narcotics sales.

Officer Bravo had stopped appellant at a gang location in June 2006. At that time, appellant admitted membership in the Young Crowd gang and that his moniker was “Smokey.” He said he had been a member for six years. Appellant was wearing a belt

buckle with the letter “C” on it and had a “Y” and “C” tattoo. Officer Bravo opined that Tibor was a documented affiliate of the Rancho San Pedro gang, an affiliate being someone who is “always just around gang members, but never been arrested, doesn’t claim any type of gang membership, no tattoos, nothing visible.”

Officer Bravo also opined that the shooting in this case was for the benefit of the Young Crowd gang. The area of 9th and Centre is in rival Rancho San Pedro gang territory. When gang members drive through rival gang territory, it is usually to look for rival gang members. It is common for gang members to do drive-by shootings with the shooter in the back seat of the vehicle and the other passengers in the front. The term “Yellow Chicken” is a derogatory remark made to members of the Young Crowd gang by rival gang members. Appellant was with a “possible” gang member in the car. That person had a shaved head and a tattoo on the back of his head, though Officer Bravo did not know what the tattoo depicted or whether the person was in a gang. Officer Bravo acknowledged that not every offense committed by a gang member is a gang offense.

Appellant testified on his own behalf. He was 18 years old at the time of the shooting. He was in the Young Crowd gang from the age of 12, but was jumped out of that gang eight months before the shooting. He did not currently have any gang tattoos.

Appellant saw Tibor on the corner of 9th and Centre Streets while appellant was a passenger in the back seat of a white Honda, driving to get something to eat. When the Honda passed Tibor, there were no words exchanged and no gang signs thrown by anyone. Appellant did not hear Tibor say, “Yellow Chicken.” After he saw Tibor, he told the driver to make a U-turn and return to where Tibor was standing so he could “mess with him.” The car stopped right in front of Tibor, and appellant took out a gun and fired one round, aiming two to three feet away from him. Tibor walked into the line of fire.

At the time of the shooting, appellant was involved in a longstanding feud with Tibor about an ex-girlfriend. Two or three years earlier, they had had a physical altercation. When they encountered each other on other occasions, they exchanged dirty looks and cursed at one another.

The gun appellant used was his nine-millimeter semiautomatic which he brought into the car with him. He had the gun from when he was in a gang, but only carried it with him for defense. Appellant told detectives he may have left the gun in the car. At no time during the shooting did appellant yell anything or flash gang signs. He denied knowing if Tibor was in a gang.

Appellant told the detectives who arrested him two days after the shooting that he did it but that he was not trying to kill, or even hit, Tibor. He was only trying to scare him.

DISCUSSION

Appellant's sole contention is that there is insufficient evidence to support the true finding of the gang allegation in connection with the felon in possession charge in count 4. He argues that the shooting was motivated by a personal dispute over a former girlfriend, that at the time of the shooting he was not a member of the Young Crowd gang, that he carried the gun for protection and that the jury found that the shooting was not gang related. This contention has merit.

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) All conflicts in the evidence and questions of credibility are resolved in favor of the verdict, drawing every reasonable inference the jury could draw from the evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) This standard applies whether direct or circumstantial evidence is involved. (*People v. Catlin* (2001) 26 Cal.4th 81, 139.) It also applies when determining whether the evidence is sufficient to sustain a jury finding on a gang enhancement. (See *People v. Duran* (2002) 97 Cal.App.4th 1448, 1456–1457; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 321–322.) Reversal on this ground is unwarranted unless "upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." (*People v. Bolin*, *supra*, at p. 331.)

The gang enhancement in section 186.22, subdivision (b)(1), imposes additional punishment when a defendant commits a felony “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, . . .” (§ 186.22, subd. (b)(1); *People v. Hernandez* (2004) 33 Cal.4th 1040, 1047.) It applies when a crime is gang related. (*People v. Castaneda* (2000) 23 Cal.4th 743, 745.)

There was no substantial evidence here that appellant possessed the gun for the benefit of the gang or with the intention of furthering a gang crime. The People’s theory as to why possession of the firearm was for the benefit of, at the direction of, or in association with a criminal street gang was that the gun assisted in the shooting, and the shooting was gang related. But there was insufficient evidence that the shooting was gang related, and the jury so found. Unlike most gang shootings, there were no gang warnings shouted, no gang signs flashed and no other reference to any gang during the incident. If, as the gang expert testified, the purpose of a gang shooting is to instill fear in the neighborhood, thereby increasing the gang’s strength, that purpose was not accomplished here where the perpetrator gave no indication that the crime was being committed for the Young Crowd gang. Further, both appellant and Tibor agreed that the shooting arose from a longstanding personal grudge between them relating to a dispute over an ex-girlfriend. There was no evidence of gang motivation for the crime. The People argue that Tibor’s comment to Monreal that appellant was a “Yellow Chicken” shows the gang nature of the crime. However, it is undisputed that appellant did not hear Tibor make that remark.

Evidence that appellant and Tibor were affiliated with gangs was minimal. While Officer Bravo testified that in June 2006, a year before the shooting, appellant admitted membership in the Young Crowd gang, appellant testified that thereafter, and before the shooting, he had been jumped out of the gang. He showed the jury a tattoo that had read, “CROWD” which was in the process of being removed. The “CR” had already been removed. Officer Bravo also testified that Tibor was affiliated with the Rancho San Pedro gang, a rival of the Young Crowd gang. Given that Tibor resided in the Rancho

San Pedro gang territory all his life, it is not surprising that he associated with gang members. But such affiliation alone is insufficient evidence that the crime was a gang crime. (*People v. Martinez* (2004) 116 Cal.App.4th 753, 761 [a crime may not be found to be a gang crime solely on the defendant's criminal history and gang affiliation].) The gang expert corroborated this point, testifying that simply because a crime is committed by a gang member does not necessarily make the crime a gang crime.

There was no credible evidence that appellant was acting in concert with other gang members, another common characteristic of a gang crime. The gang expert's testimony that the shooting was for the benefit of the gang because the driver was bald with an unidentified tattoo on the back of his head, and the placement of the shooter in the rear of the car was common in gang drive-by shootings, was sheer speculation. Today, bald heads and tattoos are commonplace among nongang members. Also, there was no evidence that nongang members would arrange themselves in the car differently to perform a drive-by shooting. Generalities about gang characteristics that could easily apply to nongang members provide little probative evidence that a crime is a gang crime. Consequently, as the jury found, there is insufficient evidence that the shooting was gang related.

If the shooting had been for the benefit of the gang, the firearm used in the shooting would logically also be possessed by appellant and used to further a gang crime. But because there was insufficient evidence that the shooting was gang related, as the jury found, absent evidence that the mere possession of the gun was for gang benefit, it is impossible to conclude that appellant intended to further a gang crime.

There was not a scintilla of evidence that apart from its use in the shooting appellant's possession of the firearm was for the benefit of, at the direction of or in association with a gang or that appellant intended to use it to further or assist in a gang crime. The gang expert did not opine that the mere possession of the gun was for the benefit of the gang, but only that it was used in what the expert believed to be a gang

shooting.³ But as previously discussed, the jury found the gang allegation untrue as to counts 2 and 3. The record is otherwise bereft of any evidence that appellant's mere possession of the gun was for the benefit of the gang. Appellant testified that he initially obtained the gun while he was in the gang and now used it for his defense. There was no evidence the gun was shared with gang members, was a gang weapon that appellant was simply holding, or that it was otherwise being held to facilitate a gang crime.

DISPOSITION

We reverse and strike the gang enhancement on count 4. The judgment is otherwise affirmed. The case is remanded for the trial court to correct the abstract of judgment to reflect that the gang enhancement is stricken.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST

³ The record is unclear as to the precise nature of the gang expert's opinion. The prosecutor asked, "Now, detective, you've sat through this entire case, and you've heard all of the witness testimony; is that correct? . . . A. Yes, Sir. Q. . . . That evidence, assuming that's all, in fact, true, do you have an opinion of whether or not *that* is for the benefit for the Young Crowd criminal street gang?" (Italics added.) The question is unclear as to what the word "that" is referring to. While the expert's response is equally unclear, as she said that, "Yes, *this* was done for the benefit of Young Crowd." (Italics added.) Considering the above testimony in the context of the expert's entire testimony, it would appear that she was only opining as to the gang nature of the shooting and based on that, the possession of the firearm was also gang related.